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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LISAMARIA MARTINEZ,

Plaintiff,

V.

COUNTY OF ALAMEDA,

Defendant.

Case No. 3:20-cv-06570-TSH

**PLAINTIFF'S TRIAL BRIEF
REGARDING USE OF DEPARTMENT
OF JUSTICE GUIDANCE AS EVIDENCE
AND IN JURY INSTRUCTIONS**

Trial Date: March 26, 2024

Judge: Hon. Thomas S. Hixson

**PLAINTIFF'S TRIAL BRIEF REGARDING USE OF DEPARTMENT OF JUSTICE
GUIDANCE AS EVIDENCE AND IN JURY INSTRUCTIONS**

Guidance from the United States Department of Justice (DOJ) regarding the Americans with Disability Act (ADA) is due significant deference and controlling weight in interpreting and understanding the relevant regulations, provided any specific guidance at issue passes a basic evaluation by the Court. As such, such guidance, while not to be confused with mandatory binding precedent, is nonetheless useful evidence that, for example, Defendant had notice of its duties under the law and provides fair and neutral language for instructing and explaining the law to the jury in, for example, jury instructions. Department of Justice guidance is also designed to explain the law in more accessible and understandable terms for a lay audience, making it particularly appropriate for a jury trying to understand complex and confusing regulations.

A. DOJ Guidance regarding ADA regulations is due deference¹ as long as it is not plainly erroneous nor inconsistent with the regulation.

Guidance from an agency is not given the identical weight as mandatory binding precedent from the relevant higher court. Nonetheless, long-standing precedent in the Ninth Circuit holds that “DOJ’s guidance on, and interpretation of, ADA regulations is entitled to *Seminole Rock* deference, such that the court must give [DOJ’s] interpretation of its regulations controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Love v. Ashford San Francisco II LP*, No. 20-cv-08458-EMC, 2021 WL 1428372, at *5 (N.D. Cal. Apr. 15, 2021) (citing *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (cleaned up). See also *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028. (9th Cir. 2008) (“[T]he Justice Department’s interpretation of its own regulations, such as the Technical Assistance Manual, must also be given substantial deference and will be disregarded only if ‘plainly erroneous or inconsistent with the regulation.’”); *Botosan v. Paul*

¹ Note that, while conceptually similar, this level of deference is distinct from so-called *Chevron* deference, 468 U.S. 837 (1984), which applies to regulations enacted when statutes are ambiguous. See, e.g., *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

1 *McNally Realty*, 216 F.3d 827, 834 (9th Cir. 2000); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); If the regulatory language being interpreted by an agency is ambiguous, then the agency’s interpretation controls so long as it is “reasonable” and “sensibly conforms to the purpose and wording of the regulations.” *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003).

7 Thus, for example, Department of Justice ADA guidance contained in an appendix to the
 8 Code of Federal Regulations has been accepted as providing interpretations to which “this Court
 9 must generally defer.” *Love v. Concord Hotel LLC*, 549 F. Supp. 3d 1047, 1049 (N.D. Cal. 2021).
 10 In regard to the Department of Justice’s technical assistance manual, the Ninth Circuit has held
 11 that it “is entitled to controlling weight unless it is plainly erroneous or inconsistent with the
 12 regulation.” *Fortyune v. City of Lomita*, 766 F.3d 1098, 1104 (9th Cir. 2014); *see also Miller*, 536
 13 F.3d at 1028. This then is what the Ninth Circuit did in *Cohen v. City of Culver City*, 754 F.3d 690
 14 (9th Cir. 2014), when it drew on the technical assistance manual to interpret the details of
 15 regulations that applied to a public entity. *Id.* at 697, 699.²

16 That said, guidance should be reviewed by the Court to evaluate whether the particular parts
 17 at issue in the guidance should be rejected rather than rejecting *all* such guidance *a priori*,
 18 without the required evaluation as to whether it is plainly erroneous or inconsistent with the
 19 regulation.

20 Defendant has not shown to anything like a sufficient level that all the guidance Plaintiff
 21 seeks to use, either as part of jury instructions or as evidence speaking to notice and thus intent,
 22 is “plainly erroneous” or “inconsistent with the regulation.” Asserting otherwise—as it does in its
 23 Trial Brief (at 10, ECF No. 101) and its Brief Regarding Propriety of Including Department of
 24 Justice Technical Guidance in Jury Instructions and at Trial (at 7-8, ECF No. 141)—does not rise
 25 to the level of requiring that the Court reject Ninth Circuit precedent and disregard *all*

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 28 ² Note that, as Ninth Circuit pointed out, it is still possible to incorrectly apply the technical assistance manual by relying on guidance application to a different regulation. *Cohen*, 754 F.3d at 698 (saying the language relied on by the district court came from § 35.150 when the district court should have been applying the more relevant § 35.151).

1 Department of Justice guidance. As such, this guidance should either not be excluded or should
 2 be allowed on a more specific basis.

3 **B. Plaintiff seeks to use the guidance as evidence where appropriate to explain
 4 and illuminate relevant issues such as that the County was on notice of its
 5 obligations under the law.**

6 The appropriateness of introducing this evidence and whether it is substantially supported by
 7 the proper process can be evaluated by the Court after Plaintiff has laid the foundation for its
 8 introduction.

9 Regardless of how much Defendant dislikes the contents of the guidance, there is no dispute
 10 as to their “existence and authenticity.” *Del Puerto Water Dist. v. U.S. Bureau of Reclamat.*, 271
 11 F. Supp. 2d 1224 (E.D. Cal. 2003). Indeed, to the best of Plaintiff’s knowledge, Defendant has not
 12 actually disputed in anything more than a conclusory fashion the language used by the
 13 Department of Justice in their guidance, nor does there appear to be any actual dispute about the
 14 *contents* of these documents as actually consisting of the guidance issued by the Department of
 15 Justice as part of official government documents. A mere assertion that Defendant “disputes the
 16 truth of the contents of the DOJ’s technical guidance” (Def.’s Brief Re: Dep’t of Justice
 17 Technical Guidance 9, ECF No. 141) is not sufficient to deny such guidance the appropriate
 18 degree of deference. The Court must still conduct an evaluation of the specific guidance at issue
 19 to determine if it is plainly erroneous or inconsistent with the regulation it purports to explain or
 20 clarify.

21 Department of Justice’s published and readily available guidance provides interpretations of
 22 regulations by the agency tasked with drafting them in a manner that makes the meaning and
 23 application of such regulations clearer and more understandable. As explained above, such
 24 guidance is already due substantial deference and controlling weight as long as it is not plainly
 25 erroneous or inconsistent with the regulation. *Fortyune*, 766 F.3d at 1104. As such, it has
 26 probative value in understanding what public entities like the County of Alameda had reason to
 27 believe their duties were.

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1 For instance, both Plaintiff and Defendant objected to the proposed instruction No. 10,
 2 regarding effective communication. The Department of Justice guidance has developed entire
 3 manuals describing its reasoned interpretation of the effective communications requirements.
 4 Because the Department of Justice is tasked with enforcing the ADA, these guidelines place
 5 public entities on notice of the specific obligations that may arise within the context of particular
 6 types of disabilities and particular types of communications. Considering for example, the
 7 following provision:

8 The type of auxiliary aid or service necessary to ensure effective communication will
 9 vary in accordance with the method of communication used by the individual; the
 10 nature, length, and complexity of the communication involved; and the context in
 11 which the communication is taking place.

12 28 C.F.R. § 35.160(b)(2). Reading this text alone could easily lead jurors to erroneously conclude
 13 that written forms are outside the scope of the ADA's effective communications requirements.
 14 With the benefit of readily available and reputable guidance, jurors would be much better able to
 15 accurately realize what types of auxiliary aids or services exist that assist for filling out forms,
 16 and that this includes forms involved in activities deeply related to very fundamental rights, like
 17 voting. Relatedly, a jury unfamiliar with the wide variety of auxiliary aids and services and how
 18 and when they can be helpful will be inclined to assume the County is similarly and reasonably
 19 ignorant, without knowing that a readily available manual exists that specifically outlines and
 20 explains actual commonplace situations involving public entities—and it is available without
 21 charge from a highly reputable source: the Department of Justice.

22 Furthermore, unlike, *e.g.*, FDA warning letters, *Smith v. I-Flow Corp.*, No. 09 C 3908, 2011
 23 WL 12627557, at *2 (N.D. Ill. June 15, 2011), or a state agency's evidence of likely violations of
 24 environmental regulations, *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 673 (5th Cir. 1999),
 25 guidance explaining and describing regulations does not create a perception of guilt. Such
 26 neutral, non-targeted documents that do not even name Defendant are even less prejudicial than
 27 the evidence of unannounced FDA inspections of a medical device company would be—and

1 evidence of those inspections was admitted as insufficiently prejudicial. *United States v. Holmes*,
 2 No. 5:18-CR-00258-EJD-1, 2021 WL 2044470, at *7 (N.D. Cal. May 22, 2021).

3 In short, there is no analogous basis for excluding Department of Justice guidance as more
 4 prejudicial than probative under Rule 403, and this evidence should not be excluded on that
 5 basis.

6 **C. Evidence from the Department of Justice’s guidance does not impermissibly
 7 usurp the role of the judge or jury in this matter.**

8 As the Court has already ruled, testimony or evidence as to legal conclusion about ultimate
 9 factual issues in this case are excludable. (See Pretrial Order 5-9, ECF No. 124; Order Re:
 10 Motions in Limine 2, ECF No. 135.) Department of Justice guidance is highly unlikely to ever
 11 meet that standard for exclusion, since the guidance interprets and explains regulations but does
 12 not apply them to the facts in the case—that is up to the Court or the jury to do.

13 Other courts in the Ninth Circuit have relied on Department of Justice guidance by applying
 14 that guidance to the facts of the case as a mechanism of evaluating whether or not a defendant
 15 has complied with the applicable regulations. *See, e.g., Love v. Wildcats Owner LLC*, 532 F.
 16 Supp. 3d 872 (N.D. Cal. 2021) (applying 28 C.F.R. § Pt. 36, App. A (“2010 Guidance”) to
 17 evaluate whether defendant hotel complied with the regulatory “Reservations Rule” in 28 C.F.R.
 18 § 36.302(e)(1)(i)-(ii)); *Landis v. Washington State Major League Baseball Stadium Pub.
 19 Facilities Dist.*, 11 F.4th 1101, 1102 (9th Cir. 2021) (concluding that the district court did not err
 20 in applying the DOJ’s “Accessible Stadiums” guidance document’s interpretation to the facts of
 21 the case).

22 Frequently, and in many contexts, industry standards, though granted much less deference
 23 than Department of Justice’s guidance, are nonetheless deemed appropriate for jury consideration
 24 when evaluating the subjective reasonableness of a defendant’s actions, *Mariscal v. Graco, Inc.*,
 25 No. 13-CV-02548-TEH, 2014 WL 4245949, at *5 (N.D. Cal. Aug. 27, 2014), an evaluation not
 26 dissimilar to that necessary to consider whether, for example, Defendant acted with deliberate
 27 indifference here. In fact, viewing Defendant’s opinions without the benefit of specific, tangible
 28 interpretation of what regulations can mean in practical terms can cause jurors to be misled into

1 believing there was no subjective notice, particularly as substantive inquiry into actual
 2 knowledge of legal obligations by a defendant is likely to fall under attorney-client privilege.

3 Finally, any potential prejudice could be cured by a limiting instruction that the guidance is
 4 illustrative, rather than conclusive. *Id.* Jurors can be expected to understand the language
 5 describing the guidance as non-binding at least as well as they can be expected to understand the
 6 terminology in the ADA and its implementing regulations, particularly as a limiting instruction
 7 can be given by the Court in lay language calculated to be comprehensible to a lay jury.

8 **D. Plaintiff has proposed that the Court draw on DOJ guidance to improve the
 9 clarity of jury instructions as it is neutral language rather than the language of a
 10 party to this matter.**

11 If jury instructions were merely literal recitations of the statutes and regulations alone, there
 12 would be little need to draft, discuss, or dispute them. Instead, jury instructions are meant to
 13 assist the jury in applying the law effectively. In keeping with this, the rule for jury instructions
 14 in the Ninth Circuit is not “literal adherence to the text” of a statute or regulation but rather that
 15 the instruction “must fairly and adequately cover the issues presented, must correctly state the
 16 law, and must not be misleading.” *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2022).

17 To the best of Plaintiff’s knowledge, there has been no challenge to the fairness nor
 18 correctness of the Department of Justice’s guidance in stating the law nor that the guidance is
 19 misleading, but only that it explains and presents the law in a manner that Defendant finds
 20 uncomfortable for maintaining its position in this matter. As such, there is no basis for
 21 challenging the use of such guidance by the Court in clarifying the meaning of the statutory and
 22 regulatory text for the benefit of the jury, provided the Court reviews and approves the language
 23 rather than simply cutting and pasting it in without review.

24 Other courts around the country have incorporated Department of Justice guidance into jury
 25 instructions as part of drafting instructions crafted for a lay jury. As two examples, a court in the
 26 Southern District of California, evaluating an ADA case around a disparate impact theory instead
 27 of one revolving around effective communication, borrowed the phrase “equally effective” from
 28 Department of Justice guidance (it is not found in the regulations), Reporter’s Transcript of

1 Proceedings (Day 4) 14:6-14:9, *Payan et al. v. Los Angeles Community College District*, Case No.
 2 2:17-cv-01697 (C.D. Cal. May 26, 2023) (an ADA case that proceeded on a disparate impact
 3 theory), as did a court in the District of Connecticut, Jury Instructions 9-10, ECF No. 163,
 4 *Hernandez v. Enfield Bd. of Educ. Et al*, No. 3:19-cv-1907 (SRU) (D. Ct., Jan. 11, 2024) (jury
 5 instructions in analogous effective communication case against local governmental entity).

6 Thus, applying the Ninth Circuit standards to jury instructions, there is no prejudice to
 7 Defendant nor reversible error in the Court incorporating the language of the Department of
 8 Justice's guidance into jury instructions where doing so would be helpful to the jury and the
 9 Court applies the two relevant Ninth Circuit standards: (1) is the guidance plainly erroneous or
 10 inconsistent with the regulation and (2) does the jury instruction incorporating language from the
 11 guidance fairly and adequately cover the issues presented, correctly state the law, and is not
 12 misleading?

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 17 DATED: March 26, 2024

Respectfully submitted,

18 TRE LEGAL PRACTICE

19 /s/ Kristopher Nelson

20 Kristopher A. Nelson

21 *Attorneys for Plaintiff*